Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-836

UNITED STATES OF AMERICA,

Petitioner,

v.

SMITH JOHN and HARRY SMITH JOHN,

Respondents.

BRIEF *AMICUS CURIAE* OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

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BRIEF *AMICUS CURIAE* OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

Pursuant to Rule 42(2), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York, 10016, files the attached brief *amicus curiae* in support of Petitioner in the above-captioned case. The petitioner, the United States of America, and the respondents, Smith John and Harry Smith John, have consented to the filing of this brief *amicus curiae*.

INTEREST OF *AMICUS CURIAE*

The Association on American Indian Affairs, Inc. is a non-profit membership corporation organized under the laws of the state of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nation-wide in scope, with a membership of 50,000 that consists of both Indians and non-Indians. The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the filing of briefs *amicus curiae* in *Oliphant v. Suquamish Indian Tribe*, No. 76-5729 (opinion pending), *Rosebud Sioux Tribe v. Kneip*, ___ U.S. ___, 51 L.Ed. 2d 660 (1977), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), and *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685 (1965).

This case presents a question of concern to the Association and to Indians generally throughout the United States—whether the Congress and the Executive Branch legally can establish an Indian reservation which is subject to federal laws applicable to Indians in the "Indian Country" on lands previously subject to state jurisdiction. The United States Court of Appeals for the Fifth Circuit has held that the Mississippi Band of Choctaw Indians is not an Indian tribe and its members are subject to the inherent police power of the state of Mississippi notwithstanding the fact that they occupy an Indian reservation established by the Secretary of the Interior pursuant to explicit statutory authority. This decision is in direct

conflict with prior decisions of this Court as to the plenary authority of the Congress to legislate with respect to Indian affairs. *See, e.g., United States v. McGowan*, 302 U.S. 535 (1938); *United States v. Kagama*, 118 U.S. 375 (1886). Other tribes occupying reservations which have been established pursuant to the same statutory authority would be adversely affected if the decision below is upheld in that they, too, might be held subject to state jurisdiction and have their tribal existence questioned.

STATEMENT OF THE CASE

The ancestral homeland of the Choctaw Indian Tribe originally included much of what is now the state of Mississippi. Prior to 1830 the Tribe ceded portions of its territory to the United States through a series of treaties[1] in which its tribal existence and its ownership of its remaining lands were recognized by the United States. This process culminated on September 27, 1830 in the Treaty of Dancing Rabbit Creek, by which the Choctaw tribe ceded the last of its land to the United States. This treaty gave individual tribal members the choice of moving to the Indian Territory or remaining in the state of Mississippi to become citizens. Subsequently, the majority of Choctaws moved west to the Indian Territory. Many remained, however, and about 2,000 Choctaws still resided in Mississippi in 1900.

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[1] Treaty of December 17, 1801, 7 Stat. 66; Treaty of October 17, 1802, 7 Stat. 73; Treaty of August 31, 1803, 7 Stat. 80; Treaty of November 16, 1805, 7 Stat. 98; Treaty of October 24, 1816, 7 Stat. 152; Treaty of October 18, 1820, 7 Stat. 210; Treaty of January 20, 1825, 7 Stat. 234; Treaty of September 27, 1830, 7 Stat. 333.

In 1917 an intensive investigation by a committee of the United States House of Representatives revealed that the Mississippi Choctaws lacked adequate housing, health, food, clothing and educational benefits.[2] Congress subsequently passed the Act of May 25, 1918, 40 Stat. 573, which appropriated $75,000 for the Mississippi Choctaws for improving health, education and housing through credit, land purchase and economic development programs. In 1921 Congress expanded the land purchase program, and from 1921 until 1932 the federal government purchased 3,680 acres of land for the Mississippi Choctaws. *See* Act of February 14, 1931, 46 Stat. 1121.

In 1934 Congress passed the Act of June 18, 1934, 48 Stat. 984 (hereinafter cited as the "Wheeler-Howard Act"), which provided, *inter alia*, that title to land purchased for Indians could be taken in trust by the United States for the Indians' benefit, and reservations created therefrom. 25 U.S.C. §§465, 467. The Act provided that Indians occupying these reservations could form tribal governments. 25 U.S.C. §476. It also defined the term "Indian tribe" to include "the Indians residing on one reservation." 25 U.S.C. §479.

Pursuant to the Act of June 21, 1939, 53 Stat. 851, Congress specifically placed title to the lands previously purchased for individual Choctaw Indians in Mississippi in trust for the benefit of all Choctaw Indians in Mississippi of one-half or more degree of Indian blood. On December 4, 1944, the Assistant Secretary of the Interior issued a proclamation under the authority of 25 U.S.C. §467 which declared such lands to be an Indian reservation.

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[2] Hearings before the Committee on the Investigation of the Indian Service, House of Representatives, 65th Cong. 1st Sess. March 6, 1917.

In *United States v. State Tax Commission of the State of Mississippi*, 505 F.2d 633 (5th Cir. 1974) reh. denied, 535 F.2d 300 (1976), reh. *en banc* denied, 541 F.2d 469 (1976), and in the instant case, the Fifth Circuit Court of Appeals has held that the actions of Congress and the Secretary of the Interior in creating the reservation for the Mississippi Choctaws did not impair state jurisdiction over the Choctaws within the reservation. In this case the court held that the reservation created for the Mississippi Choctaws is not "Indian Country" as defined in 18 U.S.C. §1151, and that consequently the federal laws applicable to Indians in the "Indian Country" do not extend to it.[3]

SUMMARY OF ARGUMENT

The Court of Appeals has concluded that Choctaw relinquishment of tribal lands in Mississippi pursuant to the 1830 Treaty of Dancing Rabbit Creek deprived the Congress of its plenary authority to legislate with reference to the Choctaws who remained in Mississippi.

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[3] 18 U.S.C. §1151. Indian Country defined.

> Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country', as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c.645, 62 Stat. 757; May 24, 1949, c.139, §25, 63 Stat. 94.

This conclusion directly is in conflict with all of the decisions of this Court which assert the power of Congress to legislate with respect to Indians whether they are on or off reservation lands. *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876).

In the Wheeler-Howard Act Congress authorized the creation of new Indian reservations for landless Indians and granted to tribes occupying such reservations the right to form tribal governments. Through the implementation of these statutory provisions the Mississippi Band of Choctaw Indians now constitute an Indian tribe occupying an Indian reservation, and their reservation is "Indian Country" as defined by 18 U.S.C. §1151.

ARGUMENT

I.

THE PLENARY FEDERAL POWER IN INDIAN AFFAIRS EXTENDS TO ALL INDIANS AND IS NOT DEPENDENT ON RESIDENCE OR ON LACK OF CITIZENSHIP.

A. Congress has plenary authority over Indians.

The Congress has plenary authority to legislate with respect to Indians and Indian affairs. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973); *United States v. Kagama*, 118 U.S. 375 (1886); *Worcester v. Georgia*, 31 U.S. 515 (1832). *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 89-115 (1942).[4] This Court has recognized that the Congress has a special responsibility to provide for the protection and welfare of

[4] In deciding Indian cases, Felix S. Cohen frequently has been relied upon by this Court, and, indeed, in Squire v. Capoeman, 351 U.S. 1, 9 (1956), was referred to as "an acknowledged expert in Indian law. . . . "

the Indian tribes, and has the Constitutional power to discharge that responsibility. It has also concluded that Congressional authority extends to Indians located outside of Indian reservations. *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *United States v. Kagama*, 118 U.S. 375 (1886).[5] Felix S. Cohen summarized the federal relationship with Indians as follows:

> It is clear that the powers mentioned by Chief Justice Marshall proved to be so extensive that in fact the Federal Government's powers over Indian affairs are as wide as state powers over non-Indians, and therefore one is practically justified in characterizing such federal power as "plenary". [F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 91 (1942).]

B. The Treaty of Dancing Rabbit Creek did not terminate Congress' power over the Mississippi Choctaws.

The Court of Appeals for the Fifth Circuit has held that, by signing the Treaty of Dancing Rabbit Creek, Congress has relinquished its obligation to and power over the Mississippi Band of Choctaw Indians. That court relied, in part, on Article III of the Treaty in which the

[5] This Court in the *Kagama* case stated:

> These Indian tribes are the *wards* of the Nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. [Original emphasis] [118 U.S. at 384].

Choctaw Tribe ceded the remainder of its land to the United States.[6] The court also placed great emphasis on Article XIV of the Treaty which granted the option to each Choctaw head of family to move to the Indian Country or remain in Mississippi and eventually become a citizen of the United States.[7] No other provisions of the Treaty, however, were cited or relied upon by the court. Thus, the lower court relied exclusively on the Tribe's relinquishment of its lands in Mississippi and the treaty provision authorizing Choctaws to remain and become citizens to support its conclusion that the plenary federal authority over the Choctaws in Mississippi has been terminated. However, neither of these treaty provisions, either separately or in concert, terminated the authority of the Congress to legislate with reference to

[6] The Court relied on the following language of Article III:

> [T]he Choctaw Nation of Indians consent and hereby cede to the United States, the entire country they own and possess, east of the Mississippi River; and they agree to move beyond the Mississippi River, early as practicable. . . . ."

[7] "Article XIV: Each Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so, by signifying his intention to the Agent within six months from the ratification of this Treaty, and he or she shall thereupon be entitled to a reservation of one section of six hundred and forty acres of land, to be bounded by sectional lines of survey; in like manner shall be entitled to one half that quantity for each unmarried child which is living with him over ten years of age; and a quarter section to such child as may be under 10 years of age, to adjoin the location of the parent. If they reside upon said lands intending to become citizens of the States for five years after the ratification of this Treaty, in that case a grant in fee simple shall issue; said reservation shall include the present improvement of the head of the family, or a portion of it. Persons who claim under this article shall not lose the privilege of a Choctaw citizen, but if they ever remove are not to be entitled to any portion of the Choctaw annuity."

Mississippi Choctaw affairs under the principles laid down by prior decisions of this Court.

1. The grant of citizenship to Indians does not impair plenary federal authority as to their affairs.

In *Cramer v. United States*, 261 U.S. 219 (1923), this Court held that the Federal Government's "duty of protection and power extend to individual Indians, even though they may have become citizens." *Id.* at 232. *Accord, United States v. Nice*, 241 U.S. 591, 598 (1916); *Heckman v. United States*, 224 U.S. 413 (1912); *United States v. Gray*, 201 Fed. 291 (8th Cir. 1912)

In *Cramer* the Court quoted from the *Gray* case, as follows:

> The civil and political status of the Indians does not condition the power of the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power nor relieve it of its duty . . . . [*Cramer v. United States*, 261 U.S. at 232.]

Indeed, this very principle has been applied to the Choctaws in Mississippi in a case relied on by the court below. In *Winton v. Amos*, 255 U.S. 373 (1921)[8] this

[8] The Court below relied on the factual findings of the Supreme Court in the *Winton* case – that the Choctaws who remained in Mississippi after the relinquishment of tribal lands did not reside on an Indian reservation and were subject to State laws. From these facts the Court below erroneously concluded that the United States by the treaty gave up its preemptive jurisdiction over the Choctaws in Mississippi and their affairs. The *Winton* case in fact affirms the continuous authority of Congress to legislate with respect to the Mississippi Choctaws. Indeed, Article XIV of the Treaty itself, expressly sanctions the continuing tribal relationship of the Mississippi Choctaws by providing: "Persons who claim under this article shall not lose the privilege of a Choctaw citizen. . . ."

Court upheld a Congressional action which allowed individual full-blood Mississippi Choctaws to be sued as a group. The Court, by so holding, specifically recognized that the federal authority over the full-blood Mississippi Choctaws had not been terminated by the Treaty of Dancing Rabbit Creek. "[I]t rests with Congress to determine when the relationship shall cease; the mere grant of rights of citizenship not being sufficient to terminate it." *Id.* at 392.

2. The absence of a reservation does not preclude Congressional authority.

This Court has ruled that Indians who do not reside on reservations are still subject to the plenary authority of the Federal Government in Indian matters. *Morton v. Ruiz*, 415 U.S. 199, 212 (1974); *United States v. 43 Gallons of Whiskey*, 93 U.S. 193 (1876). *See also Rosebud Sioux TRibe v. Kneip*, ___ U.S. ___ 51 L.Ed. 2d 660 at 682 n.48 (1977); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 538 F.2d 370 (1st Cir. 1975). Indeed, as the Court in *Ruiz* correctly observed, nearly all Indians living in the states of Alaska and Oklahoma would be denied federal services, which they now receive, if reservation status were a prerequisite for the exercise of federal authority over Indians. *Morton v. Ruiz*, 415 U.S. 199, 212 (1974).[9]

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[9]The specific statute at issue in the *Ruiz* case was the so-called Snyder Act, 42 Stat. 208, 25 U.S.C. §13. It reads in part as follows:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such monies as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians *throughout the United States* .... [Emphasis supplied].

[footnote continued]

In the *Winton* case, this Court held that Congress retained its authority over the Choctaw Indians residing in Mississippi, thus enabling the Congress to authorize a suit against them as a group. The fact that the Mississippi Choctaws did not reside on a reservation was not even considered by the Supreme Court when it decided that Congress had authority to legislate with respect to their affairs after the relinquishment of tribal lands in the Treaty of Dancing Rabbit Creek. *Winton v. Amos*, 255 U.S. 373 (1921).

The conclusion of the court below that the United States through the Treaty of Dancing Rabbit Creek terminated the guardian-ward relationship between the Federal Government and the Choctaws in Mississippi is wholly inconsistent with the decisions of this Court, including the *Winton* decision.[10] Moreover, even if the Treaty did terminate the relationship, as the following discussion will show, Congress has the authority to reestablish it.

The Court specifically limited its ruling to the facts before it – whether the benefits of the Bureau of Indian Affairs' general assistance program must be provided to Indians living near a reservation. The opinion, however, implicitly concedes that the Snyder Act was a grant of authority to the Bureau that Congress had the power to make.

[10] Indeed, if the Treaty of Dancing Rabbit Creek had the effect accorded it by the Court of Appeals – that the federal relationship with the Mississippi Choctaws, in fact, completely was terminated– then Congress had no authority to act as it did between 1918 and the present for their benefit. As this Court has observed, Congress Constitutionally may legislate special treatment for Indians "only as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . ." Morton v. Mancari, 417 U.S. 535, 555 (1974).

II.

CONGRESS MAY LEGISLATE FOR THE PROTECTION OF INDIANS ANYWHERE IN THE UNITED STATES AND MAY ESTABLISH RESERVATIONS FOR THEIR BENEFIT WHICH CONSTITUTE "INDIAN COUNTRY"

A. Congress may establish Indian reservations for landless Indians which constitute "Indian Country."

As this Court stated in *United States v. Sandoval*, 231 U.S. 28 (1913), "the question whether, to what extent, and for what time they [Indian tribes] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by the Congress, and not by the courts." *Id.* at 45, 46. *Cf. United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926).

Furthermore, under the authority of the special federal relationship, Congress has power to establish Indian reservations under exclusive federal jurisdiction for landless Indian groups. In *United States v. McGowan*, 302 U.S. 535 (1938), this Court held that land purchased for a group of Indians called the Reno Indian Colony,[11] title to which was held by the United States in trust for the group, was "Indian Country." The Court noted that, with respect to the land set apart for the Colony, "the

[11] The Court in the *McGowan* case noted: "The Reno Indian Colony is composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress in 1916 and 1926. The purpose of Congress in creating this colony was to provide lands for needy Indians scattered over the State of Nevada, and to equip and supervise these Indians in establishing a permanent settlement." 302 U.S. at 537.

government has authority to enact regulations and protective laws respecting this territory" *Id.* at 539. and quoted its opinion in *United States v. Ramsey*, 271 U.S. 467 (1926) as follows:

> Congress possesses the broad power of legislating for the protection of the Indians wherever they may be within the territory of the United States. [*United States v. McGowan*, 302 U.S. 535, 539 (1937)]

The Court's observations regarding the authority which Congress maintains over land set aside for Indians, regardless of the manner in which the land was acquired, are worth noting:

> The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as "reservations." Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out, and it is immaterial whether Congress designates a settlement as a "reservation" or a "Colony." [*Id.* at 538, 539.]

Thus, this Court has recognized that Congress has the authority to establish Indian reservations for specific groups of Indians and to extend exclusive federal jurisdiction over them.

B. The Wheeler-Howard Act authorized the establishment of reservations and the organization of tribal governments for Indians of one-half or more degree Indian blood who lacked reservations and tribal organizations as of the date of the Act.

The decision below relied on a determination that the Wheeler-Howard Act did not apply to the Mississippi Choctaws. Consequently, so the argument runs, the creation of a reservation for the Choctaws pursuant to authority conferred on the Secretary of the Interior by that Act did not reestablish federal criminal jurisdiction over Choctaws on the reservation.

This conclusion is in direct conflict with the plain language of the Wheeler-Howard Act, as well as with evidence of the Congressional intent contained in its legislative history. From the original drafting of the bill under the auspices of the Executive Branch, one of its principal purposes was to provide for reservations and other benefits "for those Indians who have been rendered landless by the government's own acts." *Hearings on H.R. 7902 before the House Committee on Indian Affairs*, 73d Cong., 2d Sess. 20 (1934).

The provisions of the bill which were intended to carry out this purpose remained virtually intact in the final legislation. The Secretary of the Interior was expressly authorized by section 5 of the Act to acquire lands ". . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. §465. He was authorized ". . . to proclaim Indian reservations on lands acquired pursuant to any authority conferred . . ." by other sections of the Act, including section 5. 25 U.S.C. §467.

Finally, he was authorized by section 16 to call a tribal election for the adoption of a constitution and bylaws by

any Indian tribe or tribes "residing on the same reservation . . . ." 25 U.S.C. §476. These provisions of the Act authorize specific actions to be taken by the Secretary of the Interior for the benefit of "Indians" who are defined in the Act, as follows:

> . . . all persons of Indian descent who are members of any recognized Indian tribe now under Federal jursidiction and all persons who are descendents of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include *all other persons of one-half or more Indian blood* . . . . [25 U.S.C. §479.] [Emphasis supplied].

Furthermore, section 19 defines the term "Indian tribe" for purposes of the Act as including ". . . the Indians residing on one reservation." 25 U.S.C. §479.

Thus, Congress made crystal clear its intention to extend to Indians and Indian tribes, *as defined in section 19*, benefits of the Act, including the purchase of land, the proclamation of reservations and the establishment of tribal governments.[12] In concluding that

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[12] On August 31, 1936 the Solicitor of the Department of the Interior issued an opinion that the benefits of the Indian Reorganization Act are available under Section 19 to "persons of one-half or more Indian blood regardless of membership in a recognized Indian tribe under Federal jurisdiction and regardless of residence on an Indian reservation." Memorandum Opinion, dated August 31, 1936, of the Solicitor, U.S. Department of the Interior.

Moreover, the question of whether Indians of one-half degree or more Indian ancestry, who were not members of a recognized tribe or descendants thereof residing on reservations, could fall within the Secretary's power to authorize the establishment of constitutional tribal governments had already been answered in a Memorandum Opinion dated April 8, 1935 by Felix S. Cohen, who was then Assistant Solicitor and who later became the acknowledged authority on Federal Indian Law. After granting

[footnote continued]

Congress was not legislating with respect to the Mississippi Choctaws when it passed the Wheeler-Howard Act, the court below completely disregarded this clear Congressional expression of the scope of the Act.

The legislative history of the Wheeler-Howard Act provides additional support for this conclusion. For example, the House Interior Committee states in its report on the bill: "To make many of the now pauperized, landless Indians self-supporting, it [the bill] authorizes a long-term program of purchasing land for them . . ." H.R. REP . NO. 1804, 73d Cong. 2d Sess. 2

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that an Indian group in North Carolina was not a recognized tribe, Cohen proceeded:

> These Indians, therefore, like many other Eastern groups, can participate in the benefits of the Wheeler-Howard Act only in so far as individual members may be of one-half or more Indian blood. Such members may not only participate in the educational benefits under section 11 of the Wheeler-Howard Act and in the Indian preference rights for Indian Service employment granted by section 12 of the Wheeler-Howard Act, but may also organize under sections 16 and 17 of the Wheeler-Howard Act if the Secretary of the Interior sees fit to establish for these eligible Indians a reservation. Such a reservation might be established either through the outright purchase of land by the Secretary of the Interior under Section 5 of the Wheeler-Howard Act, or by the relinquishment to the United States of land purchased by the Indians themselves, under the same section of the Wheeler-Howard Act, or by a combination of these two methods of acquisition. A reservation having been established, those residing thereon will be entitled to adopt a constitution and bylaws and to receive a charter of incorporation. Under section 19 of the Wheeler-Howard Act the "Indians residing on one reservation" may be recognized as a "tribe" for the purposes of the Wheeler-Howard Act regardless of their previous status. [Memorandum Opinion, dated April 8, 1935, of the Assistant Solicitor, U.S. Department of the Interior].

(1934). In House debate on the bill on June 15, 1934, the bill's principal sponsor, Congressman Howard, stated:

> The sections mentioned are designed to prevent loss of Indian land. But prevention is not enough. The Indians now landless must be provided for. This section undertakes to do this gradually through an annual appropriation for the purchase of land . . . . Incorporation [under section 16] does not answer the whole problem of Indian home rule. Section 17 grants to Indians still living in a reasonably compact community the right to organize for their common welfare, to adopt a constitution and bylaws and to elect a tribal business committee. [78 CONG. REC. 11726 (1934).]

Thus, in the Wheeler-Howard Act, Congress, pursuant to its plenary power in Indian affairs, expressly has authorized the Secretary of the Interior to take the steps which have established the lands held in trust for the Choctaws in Mississippi as an Indian reservation.

C. Pursuant to specific Congressional sanction the Secretary of the Interior established the Mississippi Choctaw Reservation by proclamation on December 4, 1944.

In addition to the general authorization to establish reservations for Indians contained in the Wheeler-Howard Act, Congress gave additional more specific sanction for the establishment of the Choctaw reservation in 1939 when it approved the request of the Secretary of the Interior for a declaration by statute that land previously purchased under earlier statutory authority for individual Choctaw Indians should henceforth be held in trust for the Choctaws as a group. Act of June 21, 1939, 53 Stat. 851. The Secretary clearly related the 1939 Act to the

Wheeler-Howard Act when he commented that the purpose of the 1939 Act would be facilitated ". . . if the Indians should organize under section 16 of the Indian Reorganization Act and take over the Administration of these lands." H.R. REP No. 194. 76th Cong., 1st Sess., 2 (1939).

After Congress specifically had sanctioned his plans for the Mississippi Choctaws by passing the 1939 Act, the Secretary proclaimed the Choctaw tribal lands in Mississippi as an Indian reservation in accordance with section 7 of the Wheeler-Howard Act. 25 U.S.C. §467. On January 11, 1945, the Secretary authorized an election for the approval of a constitution and bylaws for the Mississippi Band of Choctaw Indians in accordance with section 16 of the Act. 25 U.S.C. §476.

D. The Choctaw Indian Reservation in Mississippi is "Indian Country" as defined in the Act of June 25, 1948, 18 U.S.C. §1151.

By the Act of June 25, 1948, 62 Stat. 757, as amended, Congress defined the "Indian Country" for federal criminal jurisdictional purposes to include ". . . all land within the limits of any Indian reservation under the jurisdiction of the United States government . . ." 18 U.S.C. §1151(a). In enacting this provision in 1948 Congress merely reaffirmed by statute the principle that Indian reservations constitute Indian Country which repeatedly had been followed by this Court. *Pronovost v. United States*, 232 U.S. 487 (1914); *United States v. Kagama*, 118 U.S. 375 (1886).

This Court also has held that the determining factor in whether Indian lands constitute Indian country is not the manner in which such lands were acquired but whether or not they have been set apart for the use and occupancy

of Indians. *United States v. McGowan*, 302 U.S. 535 (1938). This principle has been followed in recent years by the federal courts in concluding that lands constitute "Indian Country" without regard to whether they formed part of a tribe's original lands or subsequently were set apart for Indians. *United States v. Martine*, 442 F.2d 1022 (10th Cir. 1971); *Youngbear v. Brewer*, 415 F.Supp. 807 (N.D. Ia. 1976) aff'd. 549 F.2d 74 (8th Cir. 1977).

Consequently, since the Choctaw lands in Mississippi have been set apart and proclaimed as a "reservation" for the Mississippi Band of Choctaw Indians, they are "Indian country". Within "Indian Country" a crime enumerated in 18 U.S.C. §1153, which includes assault with intent to commit murder, is subject to exclusive Federal jurisdiction and is not subject to prosecution under state law. *Seymour v. Superintendent*, 368 U.S. 351 (1962).

CONCLUSION

The plenary authority of Congress in Indian affairs extends to all Indians throughout the United States and is not dependent on the existence of a reservation or on lack of citizenship. The Treaty of Dancing Rabbit Creek was not intended to terminate such plenary power over the Mississippi Choctaws nor to abolish the federal relationship with them. Even if the Treaty had terminated the guardian-ward relationship between the United States and the Mississippi Choctaws, Congress has the power to reestablish the relationship. Moreover, Congress may reestablish Indian reservations and Indian tribes, as it did with respect to the Choctaw Reservation in Mississippi and the Mississippi Band of Choctaw Indians.

Therefore, the Mississippi Band of Choctaw Indians is a federally recognized Indian tribe which resides on a federal Indian reservation. Its reservation is "Indian Country" pursuant to the provisions of 18 U.S.C. §1151 (a). Consequently, its members are subject to the Federal laws which apply to Indians in the "Indian Country" as to all matters arising on its reservation. Among these laws is 18 U.S.C. §1153, which vests in the United States (to the exclusion of the State of Mississippi) jurisdiction to prosecute such members for the offenses enumerated therein.

For the foregoing reasons *Amicus Curiae* respectfully requests that the judgment of the United States Court of Appeals be reversed.

Respectfully submitted,

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